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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. A-738

72-1099

UNITED STATES OF AMERICA,

vs.

ROBERT ROCCO RUSSO,

Petitioner.

CRIMINAL ACTION—ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. A-738

UNITED STATES OF AMERICA,

vs.

ROBERT ROCCO RUSSO,

Petitioner.

CRIMINAL ACTION—ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Robert Rocco Russo, respectfully prays that a Writ of Certiorari issue to review the Judgment entered by the United States Court of Appeals for the Third Circuit under Docket No. 72-1348, the Judgment being rendered on December 12, 1972 with the Honorable Circuit Judges Gibbons, Rosen and Layton, sitting.

OPINION BELOW

An Opinion was rendered by the United States Court of Appeals for the Third Circuit on December 12, 1972 with the Judgment being filed that same date denying the appeal of your Petitioner, Robert Rocco Russo. A copy of said Opinion is attached hereto as Appendix "A". The Opinion of the Court is reported in — F.2d — (3 Cir. 1972).

JURISDICTION

The jurisdiction of the United States Supreme Court is invoked to review the Judgment of the United States Court of Appeals for the Third Circuit dated December 12, 1972. The time within which a Petition for Certiorari was to be filed was extended to February 10, 1973 by Order of Associate Justice William J. Brennan, Jr. dated January 10, 1973. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a criminal trial, comments by the prosecuting attorney for the purpose of associating a defendant with an infamous syndicate of organized crime, absent any evidence of such an association, is so patently prejudicial as to deny defendant his Constitutional right to a trial by a fair and impartial jury.

2. Whether the Judicially enunciated guidelines presently existing with respect to what constitutes prejudicially improper prosecutorial comments is so broad and indefinite so as to require clarification and redefinition to insure Petitioner's Constitutional right to a trial by a fair and impartial jury.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5 – "No person shall be ° ° ° deprived of life, liberty or property without due process of law."

United States Constitution, Amendment 6 – "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Petitioner, Robert Rocco Russo (named as Bobby Russo in the Indictment and trial) was indicted with one Frank Pizzi for conspiring to use extortive means in an attempt to collect an extension of credit to Robert Roy Russo (no relation to the Petitioner) and his knowingly using extortive means in collecting this loan, all in violation of the Consumer Credit Protection Act 18 U.S.C. §894. A trial before the United States District Court and a jury was begun on September 15, 1971, ending in a mistrial as a result of the failure of the jury to agree on a verdict. A retrial was commenced on December 8, 1971 before the same Judge and a jury, with the jury returning a verdict, on December 17, 1971, of guilty on both counts. Thereafter Petitioner was sentenced to three years in the federal penitentiary. This conviction and sentence was affirmed by the United States Court of Appeals for the Third Circuit (See Appendix "A", Appendix "B").

The case centered upon the issue of credibility. As noted by the Court of Appeals: "credibility was virtually the entire issue before the jury" (A. 5). Three witnesses for the prosecution (the complaining witness, his wife, and the ex-girlfriend of the defendant Pizzi) testified as to threats that were allegedly made upon the complaining witness by Pizzi and the Petitioner (A.2). The complaining witness also testified as to alleged physical assaults made upon him by Pizzi (none of these assaults alleged to have been administered by the Petitioner), with the ex-girlfriend of the defendant Pizzi corroborating one assault by Pizzi upon the complainant (A. 2). Both Petitioner (who had no previous criminal record) and his co-defendant took the stand and denied all the allegations of threats, extortion and the implicating circumstances primarily testified to by the complaining witness and his

wife. In passing upon Petitioner's argument made below that there was insufficient evidence to support the verdict, the Court of Appeals noted: "Admittedly, much of this testimony was that of the prosecuting witness, the veracity of which was severely questioned by defendants. But it is the jury's function, not ours, to determine the credibility of the witnesses" (A. 2). The issue, as characterized even by the prosecutor's summation, was simple. "The only issue was a loan made? Was it collected by extortionate means? "That's all" (A. 9). However, instead of addressing himself to that issue the prosecuting attorney proceeded to develop an unfounded hypothesis, insinuating and creating the impression that the Petitioner and his co-defendant were part of a well organized Mafia criminal syndicate dealing in, among other things, numbers, booking, horses and shylocking, and were also guilty of other crimes.

Tracing the chronology, the Prosecutor first introduced into the testimony the catch letters "N.B.H.S.," later explained in the testimony of the complaining witness and his wife as being "numbers, booking, horses and shylocking," the earmarks of organized crime. Thereafter, in summation, the prosecutor attempted to tie this catch phrase, denoting organized crime activity, with a cocktail lounge that was at one time to be purchased by the defendant Pizzi, and the gasoline station where the defendant Pizzi testified he was actually employed. His theme of tying the two locations together into one massive organized criminal web of intrigue commenced with his statement:

> "It would have meant, yes, he and his partner, Bobby Russo, were going to take over. They were going to buy into the Pink Pussy Cat Lounge. And what were they going to do there? What was this whole

> mystique about the telephone calls, how Robert Roy Russo, for two nights a week work could make two hundred dollars a week. *Well, what was going on at Pat Malagna's gas station that everybody was hanging out there? A simple two-bit gas station. And everybody's there.*
>
> Think back to January 24 when the four men were in the bar. The last time Robert Roy Russo was hit. And one of them says, *'How about handling NBHS, numbers, book, horses and shylocking?' Is that it? Is that what was going to go on?"* (Emphasis supplied) (A. 15).

Continuing, the Prosecutor stated:

> "And again the four men are there. 'Hey, you know, Frank was in the same boat as you are. He was up against it. We gave him a chance. We gave him a chance to work it off. And he did. You handled that real well, Frank. *You handle NBHS at Hoffman La Roche.*' I didn't even know that he could have guinea pigs. They don't bet. He didn't do it. And all this time why isn't he going to the police?" (Emphasis supplied) (A. 18).

Thereafter he referred to the gas station, asking the questions of the jury:

> "Send the money to Pat's gas station. Again, Pat's gas station. *What's going on at Pat's gas station?* She sent it. Here it is. Here it is. Signature on the back, 'Frank Pizzi'. Made no attempt to prove, ladies and gentlemen, that this is Frank Pizzi's signature, and indeed, from those receipts, the signatures do not match. I'll concede to that. He said, 'Send it to Pat's gas station, and that's where it was sent. *What was going on at Pat's gas station? I don't know. I wasn't there. There were a lot of strange people there. Frank is one of them.*" (Emphasis supplied) (A. 21).

Extending the embellishment of his theme to its extreme, he tied everything together as follows:

> *"And the important thing about it is that they were going to buy the Pink Pussy Cat and turn it into what they were going to use it for. NBHS. Those, are important letters. To tie in with Pat Malanga's gas station, to tie in what they wanted to do with the Pink Pussy Cat. To tie in with what they wanted Robert Roy Russo to do. Two hundred dollars. Insignificant. They had a fish. Or they thought they had a fish. And they wanted to use him, get him in a bind, scare him, get somebody to work for them. That's what it was. That's the end of it. In a nutshell. There wasn't more. You can dwell on it all."* (Emphasis supplied) (A. 24).

Coupled with those references is the Prosecutor's comment made, without support in the record, that defendant Pizzi was at Malanga's gas station "twirling his gun" (A. 16). Added further in the attempt to discredit the character of the Petitioner and defendant Pizzi, were statements to the effect that Pizzi had "contacts" with the local police department, and that the gas station at which Pizzi worked was frequented "by strange people" (A. 19; A.21). Completing the smear, the United States Attorney inferred that he personally believed the government's witnesses told the truth, (A. 8) and concluded, stating:—

> "Ladies and gentlemen, from these facts, if you find these defendants are guilty, no sympathy, no prejudice, no cynicism and no fear. Do your duty. Come back and say guilty. That's your job. That's your sworn oath." (A. 24).

These were the circumstances which were presented to the jury for the deliberation in a case that, admittedly,

was a close one, in which the first trial had ended in a mistrial because of the failure of the jury to agree, and one in which "credibility was virtually the entire issue before the jury" (A.5). In passing upon the Prosecutor's actions in summation, the Court of Appeals, although affirming the conviction, noted:—

> "This does not say that we condone the remarks made by the prosecutor during summation. They are of doubtful propriety. Although supported by the testimony, they approach the outer limits of permissible inference from that evidence, and in other circumstances, they might have constituted reversible error." (A. 5).

REASONS FOR GRANTING THE WRIT

There are three basic reasons supporting the application for the Writ in this instance: (1) This Court has not decided a case involving the elucidation of a standard for comment in prosecutional summations in 38 years, and with the problem being a recurring one, involved in every criminal case (both Federal and State) and with the lower courts' *ad hoc* attempts to further define the bounds of prosecutorial comment and prejudice, Supreme Court guidance is required; (2) the present national preoccupation with stamping out organized crime demands the setting of a precise standard to monitor prosecutorial comment in summations to insure that defendants charged with crimes which are not connected with an organized criminal or Mafia conspiracy are not painted with the sinister brush of organized crime by improper prosecutorial comments; and (3) the comments by the prosecutor in this case cry out for reprimand and reversal as being clearly "foul" under the general rubric enunciated by this Court in *Berger v. United States*, 295 U.S. 78 (1935).

In each and every criminal case that is tried to a conclusion there is a summation made by the Government. An otherwise unadulterated trial can be distorted by the nature of the Prosecutor's summation. Because of the special position he plays, the delicate balance necessary for a fair trial can be destroyed.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which

> is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States, supra,* at p. 88.

With this as background, a search for this Court's decisions in this area uncovers only two that consider the bounds of prosecutorial comment in summation. One specifically deals with this subject matter as a holding—*Berger v. United States*, 295 U.S. 78 (1935): In *dictum*, *Viereck v. United States*, 318 U.S. 236 (1943), comments on the issue. Thus, in terms of guidance by this Court to lower Federal and State Courts in connection with measuring prosecutorial conduct in summation, the very generalized language in *Berger* stands as the only decisional guideline. And in *Berger*, short of the abbreviated guide that the prosecutor is permitted to strike "hard blows" but he is not at liberty to strike "foul ones," no further standard of conduct guidelines are offered.

A divergence of approaches to the application of this standard has developed in the intermediate Federal Appellate Courts, leaving those courts adrift on a boundless sea.[1] Thus cases have been decided using the doctrine

[1] For a recent compilation and commentary on prosecutorial misconduct, reviewing, to a significant extent, the divergent state court applications of the Berger doctrine, see 50 Texas L. Rev. 629 (1972).

of harmless error to apply theories of trial gamesmanship. Was the case a strong one or a weak one,[2] a long one or a short one,[3] or was timely objection made.[4] Compare, for example, Judge Learned Hand's approach to an evaluation as set forth in *United States v. Wexler*, 79 F.2d 526 (2 Cir. 1935), with Judge Jerome Frank's approach in *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 642 (2 Cir. 1945) (dissenting opinion) and Judge Bazelon's note as to the tenuous nature of the harmless error presumption in *Allen v. United States*, 273 F.2d 85, 87 (D.C. Cir. 1959) (dissenting opinion).

Judge Hand views the question as a "whole trial" evaluation stating:

> "It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood and that the truth is not likely to emerge if the prosecutor is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction. The question is always as to the particular incident challenged, in the setting of the whole trial." *United States v. Wexler, supra*, at p. 529.

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[2] *E.g., McFarland v. United States*, 150 F.2d 593 (D.C. Cir. 1945); *Handford v. United States*, 249 F.2d 295 (5 Cir. 1957); *Knight v. United States*, 297 F.2d 675 (5 Cir. 1962).

[3] *E.g., United States v. Kravitz*, 281 F.2d 581 (3 Cir. 1960); *United States v. Ramos*, 268 F.2d 878 (2 Cir. 1959); *Isaacs v. United States*, 301 F.2d 706 (8 Cir. 1962).

[4] *E.g., United States v. Lawson*, 337 F.2d 800, 807 (3 Cir. 1964), *but compare Viereck v. United States*, 318 U.S. 236 at 248 (1943): "We think that the trial judge should have stopped counsel's discourse without waiting for an objection."

Judge Frank considers the English approach with the emphasis being the opposite way:

> "Most (not all) of the precautionary and exclusivity rules have been derived from, or have been perpetuated because of, the recognition of the untrained capacity of jurors; for that reason, departures from those rules are usually not error when a trial judge sits without a jury. But if in a jury trial in a criminal suit (a) there has been a violation of any of these rules—designed to keep from the jurors matter which might improperly influence them against the defendant—and (b) the verdict is adverse to him, and (c) the evidence is not such that, had that rule not been violated, a reasonable jury would unquestionably have reached the same verdict, then, unless the verdict is set aside, the very purpose of the rule is frustrated. The point is that, if such a violation is held harmless, the rule has been abandoned . . . unless the rule is senseless and should never have been adopted, the defendant has not received a fair trial." *United States v. Antonelli Fireworks Co., supra,* at p. 652.

On an overview, Judge Bazelon states:

> "We cannot assume that either the prosecutor's failure or the defendant's testimony removed from the minds of all the jurors all the prejudice against the defendant that the prosecutor had caused by asserting that the defendant had refused to talk to the police. This assertion, which was never shown to be true, may well have colored some juror's views of the act for which the defendant was being tried. . . . I cannot say that the prosecutor's statement ceased to be prejudicial and did not affect the defendant's substantial rights." *Allen v. United States, supra,* at p. 87.

What, in the ultimate, is the standard applied after paying lip-service to the pronouncement of this Court in *Berger*? Does it amount to nothing more than a gut reaction by

the reviewing Court to the record of the trial as a whole, which may, in effect, constitute a usurpation of the function of the jury? What is needed is a definitive standard to be utilized by intermediate Appellate Courts in evaluating admitted prosecutorial abuses of his right to comment in summation.

Coupled with the lack of a standard to be utilized in measuring the effect of improper prosecutorial comment in summation, is the impact that the rampant national preoccupation concerning organized crime and Mafia activity has upon members of the jury sitting in a case which involves activity not charged as being part of an organized criminal conspiracy but which could be so classified. It is virtually indisputable that the mere mention or hint that the defendant is a part of organized crime or has Mafia connections, automatically places the accused, in the eyes of the public (and more importantly in the eyes of the jury) as a devious element of society, to be rooted out, punished and destroyed.[5] Since the time of the Kefauver Committee hearings, organized crime and the Mafia are identified as dealing in gambling, loan sharking, bootlegging and narcotics.[6]

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[5] See, *e.g.*, *Senate Special Committee to Investigate Organized Crime in Interstate Commerce*, 3D Interim Rep., S. Rep. No. 307, 82d Cong., 1st Sess. (1951); *Hearing on Measures Relating to Organized Crime before the Sub. Comm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Senate Committee on the Judiciary, Organized Crime Control Act of 1969*, S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969); *The 1965 Oyster Bay New York Conference on Combating Organized Crime, Office of the Counsel to the Governor, Albany, New York, Combatting Organized Crime* (A report 1966); *The President's Commission On Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 187-209 (1967); D. Cressy, *Theft of the Nation, The Structure and Operations of Organized Crime in America* (1969).

[6] For an article setting forth in detail public pronouncements, studies and legislation with reference to organized crime see *Malone, The Problem of Categorizing and Controlling Organized Crime*, 36 Albany L. Rev. 330 (1972). While the author states that the term organized crime has an "Alice in Wonderland" quality, clearly gambling, loan sharking, bootlegging and narcotics form its bedrock. *Malone, op. cit. supra*, at p. 330, n.1.

> "There is a sinister criminal organization known as the Mafia operating throughout the country with ties in other nations, in the opinion of the Committee. The Mafia is the direct descendant of a criminal organization of the same name originating in the island of Sicily. In this country, the Mafia has been known as the Black Hand and the Unione Siciliano. The membership of the Mafia today is not confined to persons of Sicilian origin. The Mafia is a loose knit organization specializing in the sale and distribution of narcotics, the conduct of various gambling enterprises, prostitution and other rackets based on extortion and violence. The Mafia is the binder which ties together the two major criminal syndicates as well as numerous other criminal groups throughout the country. The power of the Mafia is based on a ruthless enforcement of its edicts and its own law of vengeance, to which have been creditably attributed literally hundreds of murders throughout the country." *Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 3rd Interim Rep., S. Rep. No. 307, 82d Cong., 1st Sess. p. 2 (1951).*

This national feeling, deep-rooted throughout the United States, and perhaps most attenuated in New Jersey where, within the past four years, organized crime has been on parade in the Courts and otherwise,[7] causes a need for the creation of precise standards of prosecutorial responsibility, coupled with and monitored by, a judicial review safety valve, so as to insure that in any criminal case involving activity of a nature that can be identified with organized crime, the defendant's right to a fair trial on the indictment charge is not polluted and distorted by

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[7] *E.g., United States v. De Carlo,* 458 F.2d 358 (3 Cir. 1971); *United States ex. rel. Catena v. Elias,* 449 F.2d 40 (3 Cir. 1971); As stated in the publication *Volz & Bridge, The Mafia Talks* 6 (1959): "The De Cavalcante Tapes–as they quickly came to be called from the time they were made public on June 10, 1969–exploded across New Jersey, then through pressrooms and criminal justice offices alike across the United States. They are one of the handful of original, important, and irrefutable source documents about American organized crime that have been made public."

prosecutorial comment in summation. While it is true that in some cases the notoriety or infamy of the particular defendant is so well known that the organized crime stigma, is difficult, if not impossible, to erase, this is not so in the great number of cases involving defendants of lesser criminal notoriety or, as in the case of the Petitioner, a defendant *without* a prior criminal conviction record nor any criminal reputation.

The case at bar presents a glaring example of how, through prosecutorial comment in summation, a sharply contested simple issue, involving at its heart, the credibility of witnesses, was turned around to lead the jury to believe that by rendering a verdict of guilty it was, in the battle against organized crime, dealing it another blow—And this, without the slightest scintilla of evidence of organized criminal activity in the case, and without any charge in the indictment or otherwise that the criminal acts for which the defendants were being tried were part of an organized criminal syndicate.

Not content to rest his comments upon the evidence and the legitimate inferences flowing therefrom, the Prosecutor sought to impress the jury with his characterization of the Pink Pussy Cat (a cocktail lounge that was supposed to be purchased by the defendant Pizzi) and Malanga's gas station (the place of defendant Pizzi's employment) as places where strange people hang out, rhetorically asking what they were doing there, and then placing the catch phrase of NBHS (numbers, booking horses and shylocking) in juxtaposition, clearly conveying to the jury an aura of organized criminal activity at the Pink Pussy Cat and Malanga's gas station, with defendant Pizzi and Petitioner an integral part of it. This coupled with the comments by the Prosecutor of defendant Pizzi having "police connections," and that he "twirled" his gun at Malanga's gas station, clearly depicted the defendant

Pizzi (and by association the Petitioner) as sinister criminal elements, undoubtedly part of the organized criminal ring. It is the gross characterization of evidence that was of no relevant importance to the trial of the simple issue, that turned the trial into something more than whether it was a conspiracy to use extortive means to collect a loan and whether either or both of the defendants were guilty of extortion itself.[8] The unfairness in this setting is apparent. As the Prosecutor's words blantently claimed:

> *"And the important thing about it is that they were going to buy the Pink Pussy Cat and turn it into what they were going to use it for. NBHS. Those, are important letters. To tie in with Pat Malanga's gas station, to tie in what they wanted to do with the Pink Pussy Cat. To tie in with what they wanted Robert Roy Russo to do. Two hundred dollars. Insignificant. They had a fish. Or they thought they had a fish. And they wanted to use him, get him in a bind, scare him, get somebody to work for them. That's what it was. That's the end of it. In a nutshell. There wasn't more. You can dwell on it all."* (Emphasis supplied) (A. 24).

A fair trial is perhaps most difficult to attain when man's natural morality becomes outraged by the alleged criminal conduct of the defendant. Thus murder, rape, narcotics, and other major criminal trials must be carefully monitored to insure that only the relevant legally admissible evidence is, in the first instance admitted at the trial, and then commented upon by the Prosecutor in summation. The sharpness of the blades of battle must be carefully kept within the bounds of legal propriety, since a very slight insinuation or innuendo uncalled for by the

[8] Compare *Handford v. United States*, 249 F.2d 295 (5 Cir. 1957) (statements by the Prosecutor linking drunken drivers on the road with the defendant who was charged with failing to obtain a federal tax stamp was held reversible).

evidence and the legitimate inferences flowing therefrom, can set off that reaction of man's natural moralistic outrage at the alleged criminal conduct under scrunity. And to introduce into this delicate balance an argument not supported by the record of organized criminal activity, triggers this natural tendency even more powerfully, causing, in its wake, the distortion of the delicate balance required to insure that the Petitioner has a Constitutionally fair trial.

From a temporal standpoint, it is indeed appropriate that this Court speak out on the issue of prosecutorial summations and a fair trial. As has been heretofore noted even in the reading of everyday periodicals, the concept of organized crime is something which continues to receive constant attention. More and more trials are occurring where the criminal activity charged could be construed to be activities in which organized crime elements are involved, yet no such charge is made. It is of primary importance that the rights to a fair trial be guarded in those instances.

At another time when national preoccupation was with World War II, this Court did speak out (*albeit in dictum*) on the concept of a fair trial and prosecutorial comment. Thus in *Viereck v. United States*, 318 U.S. 236 (1943), where the defendant was charged with violating the Federal Agent Registration Act, this Court specifically commented upon the unfair statements by the prosecutor in creating a direct relationship between the criminal activity for which the defendant was being charged and the war in which the country was engaged. As the Court stated:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed

> to the jury were highly prejudicial and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think the trial judge should have stopped counsel's discourse without waiting for an objection." (318 U.S. at 248).[9]

The Constitutional standard of a fair trial does not countenance evidence of other crimes no matter how depraved in character or how full of crime the defendant's life may have been. See *Boyd v. United States,* 142 U.S. 450 (1892). It makes the unfairness even greater when the accusation in the summation is not even supported by any evidence in the case, *i.e.,* that the Pink Pussy Cat, Malanga's gas station, and the defendants were all part of a large organized criminal NBHS ring. Add for further effect the unsupported comment that the defendant Pizzi was seen "twirling his gun" at one of those locations, and prejudice infected the jury consideration. And these comments are made in a case where the Petitioner, a person who has no criminal record or involvement, and who takes the stand, is charged with the simple crime of using extortive means to attempt and to collect an extension of credit.

The collocation of circumstances in the case at bar, *i.e.,* 38 years of no direction from this Court on the bounds of prosecutorial misconduct, the current frenzied preoccupation to stamp out organized crime and the clearly prejudicial effect of the prosecutorial comments in this case compel the granting of the Petition for Certiorari.

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[9] See also, *Bary v. United States,* 248 F.2d 201 (10th Cir. 1957), where, in the trial of a conspiracy to advocate and teach the duty and necessity of the overthrow of the American government by force and violence, the prosecutor's comments that the defendants would support Russia against the United States in the event of war and were of the same ilk as Klaus Fuchs and the Rosenbergs, compelled condemnation of the Prosecutor's comments.

CONCLUSION

For all of the reasons set forth herein a Writ of Certiorari should issue to review the Judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 72-1347, 72-1348

UNITED STATES OF AMERICA,
Appellee,

vs.

FRANK PIZZI and ROBERT ROCCO ("Bobby") RUSSO,

FRANK PIZZI,
APPELLANT IN No. 72-1347

ROBERT ROCCO RUSSO,
APPELLANT IN No. 72-1348

(D.C. CRIMINAL No. 104-70)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Opinion of the United States Court of Appeals for the Third Circuit
(Filed December 12, 1972)

SUBMITTED OCTOBER 16, 1972 AS TO No. 72-1347
ARGUED OCTOBER 16, 1972 AS TO No. 72-1348

Before GIBBONS and ROSEN,* Circuit Judges and LAYON, Senior District Judge.

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* Judge Rosen participated in the conference following the argument of this case but died before this opinion was filed.

PER CURIAM:

Frank Pizzi and Robert Rocco ("Bobby") Russo were indicted for conspiring to use extortionate means in an attempt to collect an extension of credit to Robert Roy Russo (no relation to the defendant) and for knowingly using extortionate means in collecting this loan, both in violation of the Consumer Credit Protection Act, 18 U.S.C. §894. The defendants were tried jointly and a jury returned a verdict of guilty as to each defendant on both counts.

Appellants have raised numerous points of error, the first being that the convictions are not supported by the evidence. Appellant Russo contends that the evidence was insufficient to support a conviction on either the conspiracy charge or the substantive count and that this motion for a new trial should have been granted. Appellant Pizzi contests the denial of his motion for acquittal on the conspiracy count alone. In either case, the motion must be denied and the verdict sustained if it is supported by substantial evidence, taking the view most favorable to the Government. United States v. Hamilton, 457 F.2d 95 (3rd Cir. 1971); United States v. DeCavalcante, 440 F.2d 1264, 1273 (3rd Cir. 1971).

The case for the prosecution consisted largely of the testimony of three witnesses covering a series of events extending for three weeks in January 1970 following a loan from defendant Russo to the prosecuting witness, Robert Russo, until the pressure on Robert Russo reached the point that he called the police and FBI for help. A fair reading of the happenings over this period, which would take pages to relate in detail, compels the conclusion that there was not only sufficient evidence to support the prosecution's case but also to establish a conspiracy. Admittedly, much of this testimony was that of the pros-

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ecuting witness, the veracity of which was severely questioned by defendants. But it is the jury's function, not ours, to determine the credibility of the witnesses. Glasser v. United States, 315 U.S. 60, 80 (1942). Clearly, the jury believed the prosecution witnesses.

Perhaps a more serious challenge to the conviction below is appellant Russo's argument that the prosecutor's summation exceeded the bounds of fairness by attributing other criminal conduct to the defendants and by making other accusations regarding Frank Pizzi's conduct, all of which were unsupported by the testimony and were prejudicial to a fair hearing of the charges then being considered by the jury. Chief among the remarks in the first group were comments by the prosecutor that the defendants were going to take over the Pink Pussy Cat Lounge apparently for illegal purposes, and later, that "they were going to buy the Pink Pussy Cat and turn it into what they were going to use it for, NBHS." Of a similar nature, the prosecutor queried, "What's going on at Pat's gas station? . . . There were a lot of strange people there." These comments appellant urges not only were unsupported by the facts but were prejudicial because they tended to attribute greater criminal activity to the defendants than that with which they were charged, implying even that they may have been involved in organized crime.

Another remark complained of was the statement, "everybody testifies to facts of threats, beating." And with respect to defendant Pizzi, the prosecutor stated that on the Saturday Robert Russo worked at the gas station, Pizzi was "twirling his gun." He also noted that Pizzi had "contacts at the Bloomfield Police Department" and was a man "who loves to go out on the town and find a girl every night."

Our initial inquiry here is whether these remarks are supported by the record. United States v. Barbone, 283 F.2d 628, 632 (3rd Cir. 1960). A thorough evaluation of the record leads to the conclusion that these comments read in context were within the bounds of reasonable inference from that evidence. There was the testimony of Nancy Rivera, whose mother owned the Pink Pussycat Lounge, that Frank Pizzi was negotiating its purchase. This was corroborated by correspondence introduced in evidence between counsel for the buyer and seller. Pizzi himself admitted to Carol and Robert Russo that he and his partner, Bobby, were going to buy it and wanted Robert to work there. They testified that the activity sounded illegal to them but Pizzi assured them he could keep Robert Russo out of trouble. Moreover, on another occasion, Robert Russo was told he could "square himself" by doing NBHS at his place of employment. Similarly, there was testimony that many people used Pat's gas station as a place to get together, that although cars came in, little gas was pumped and that Pizzi, when there, had on sports clothes and spent his time on the telephone.

Certainly, all three witnesses for the prosecution testified to threats. The account of assaults by Robert Russo was corroborated by the observation of Linda Palmisano. Pizzi himself admitted to Robert and Carol Russo that he had connections with the police, and on two occasions, Robert Russo observed him talking with police officers. The testimony on Frank Pizzi's night life, his relations with Linda Palmisano, and by his own testimony, at least two meetings with prostitutes during the three week period in January, provided support for other remarks of the prosecutor. Finally, there was much testimony regarding Frank Pizzi's gun and his willingness to use it. Despite the absence of evidence specifically to support the "twirling" incident, we do not find this remarks alone enough to constitute reversible error.

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This does not say that we condone the remarks made by the prosecutor during summation. They are of doubtful propriety. Although supported by the testimony, they approach the outer limits of permissible inference from that evidence, and in other circumstances, they might have constituted reversible error.

The record here, however, reveals that the contest was hard fought and both sides "'clash'd on their sounding shields the din of war.'" United States v. Stirone, 262 F.2d 571, 577 (3rd Cir. 1958). The evidence consisted almost entirely of testimony with the witnesses on each side supporting theories violently opposed. Credibility was virtually the entire issue before the jury. Moreover, when comparing the arguments of defense counsel on summation, we cannot say that the prosecutor took greater liberty in drawing inferences from the evidence.* Finally, it is significant that no objection was made by defense counsel at the end of summation or the following morning before the judge instructed the jury. Although the absence of objection need not be decisive, we do not find this case to present exceptional circumstances which permit us to ignore this omission. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-39 (1940); United States v. Lawson, 337 F.2d 800, 807 (3rd Cir. 1964).

We have also reviewed the numerous other contentions raised by appellants and find them to be without merit.

The judgment of the District Court will be affirmed.

To the Clerk of the Court:

Please file the foregoing opinion.

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* Counsel for appellant Pizzi likened the trial to a movie which at first glance might be entitled "The Great Loan Sharker, Frank Pizzi," but which counsel theorized should more accurately be called "The Great Con Man. The greatest Con Job Ever Produced, Robert Roy Russo." His explanation was in large part based on marital conflicts of Robert and Carol Russo totally unfounded on the record except for the fact that they have since separated.

APPENDIX "B"

Judgment of the United States Court of Appeals for the Third Circuit

Present: GIBBONS and ROSEN,* Circuit Judges and LAYTON, District Judge.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel, as to case No. 72-1348 and submitted as to case No. 72-1347.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed March 16, 1972, be, and the same is hereby affirmed.

ATTEST:

/s/
Clerk

December 12, 1972

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* Judge Rosen participated in the conference following the argument of this case but died before this opinion was filed.

APPENDIX "C"

Summation by Mr. Richardson

(660) THE COURT: Mr. Richardson.

MR. RICHARDSON: May it please the Court, Mr. Schwartz, Mr. Alongi, Mr. Foreman, ladies and gentlemen of the jury. As you know by now, it's the end of the case. No more evidence. No more witnesses. No more documents. It's all before you, what you will decide, the guilt or innocence of Frank Pizzi and Bobby Russo. It will be decided based upon what you have heard from the witnesses and the documents that have gone into evidence. That's all. You are the triers of the facts. Your province is the facts and the facts as it came from those witnesses and those documents which are in evidence. Keep in mind, that when you deliberate, the criteria is only those facts, not what you would have done in a similar situation, not what any witness or any defendant should have done in a similar situation. Only what was done, what was done in January, 1970. That's the criteria. No passion. No sympathy. No cynicism, no prejudice should enter into your verdict. Only the facts. Decide only the facts as you heard them. That can't be repeated too many times.

Before I get into those facts, I would like to (661) comment slightly on the witnesses, the motivation, why are they on the stand? What do they have to gain? Frank Pizzi and Bobby Russo, their interest is obvious. I won't even comment on that. Robert Roy Russo. What reason does he have to fabricate a story, a tale that took several hours on the witness stand? Why would a man get on the stand, bare his life, a sordid part of his life, let the whole world know about his marital problems, let the whole world know about his financial problems, let the whole world know that he's separated? Why?

You heard the defendant, Frank Pizzi, you heard the defendant, Bobby Russo, testify that they had a relationship with him. They were friends, notwithstanding the fact that Frank Pizzi called him stupid. You heard Bobby Russo, that they went out, together, socially, never heard a reason from them as to why Robert Roy Russo would get on the stand and lie. Why did it end? Why did this association end? No argument. No fight. No disagreement. No vital breakup. No reason. No reason in the world for him to get on the stand and lie.

Carol Russo, separated from her husband in June, 1970, about six months after the occurrence. She doesn't live with her husband any more. She doesn't (662) have to go home and face him. She hasn't lived with him for a year and a half. She doesn't have to say, "Honey, I backed up your story even though it wasn't true" or the reverse. She doesn't have to say, "I couldn't do it. I couldn't back up your story because it wasn't true." Why did she take the stand? Because her testimony was true.

Linda Palmisano. She went out with Frank Pizzi, hasn't seen him in about a year and a half. Happily married now. Been married for over a year. Doesn't work at the Pink Pussy Cat. Doesn't work at all any more. Not a stellar background by any stretch of the imagination. Why would she get on the stand and support a fabricated story, that story of Robert Roy Russo, and subject herself to vigorous cross-examination, bringing out her background, bringing out her relationship with Frank Pizzi? The only reason why she would do it is because it's true. It's true.

At the beginning of this case I told you what the issue was. I phrased it in simple terms. There was a loan made and it was collected by extortionate criminal means. And the Court will charge you on what the law is, what those

terms mean, extortionate criminal means. That's the issue. Whether or not Robert Roy Russo was the perfect husband, whether or (663) not he was having marital difficulties, what he was doing when he saw him, is no concern in this case. Enters not into your deliberations one iota. We are not here to judge Robert Roy Russo and his relationship with his wife, and thank God we are not.

A relationship between a husband and wife is a very delicate thing, as you all probably know. There are thousands of things that go in and enhance that relationship or destroy it. It's not part of this case. Get it out of your mind.

The issue, the only issue was a loan made? Was it collected by criminal extortionate means? That's all.

The discrepancies. Certainly there are discrepancies. There are discrepancies in the Government's case. They are not major conflicts, but there are discrepancies. Robert Roy Russo testifies to a hundred dollars for the traffic tickets. It's a hundred thirty-six dollars. Was he out four nights a week or five nights a week? Was he in the Pink Pussy Cat three times or four times or ten times? Discrepancies, yes. But not major discrepancies.

If five people stand on a street corner and watch an automobile accident, five minutes later you talk to (664) those five people and they will all give you somewhat varying opinions as to what happened in that automobile accident. But they will all come back to the one simple issue. The one fact, there was an automobile accident. People see things in different ways. This is two years. Two years after January, 1970. No one made a diary of the events of 1970 in January. People saw and remembered things in a slightly different fashion. Hence, the discrepancies.

But the basic facts are there. Everybody testifies to a loan. Everybody testifies to facts of threats, beatings. Everybody testifies to the simple issue of this case. The discrepancies are on the minor points, the insignificant points. Ladies and gentlemen, if this were a fabricated story, everybody would testify straight down the line. There'd be no discrepancies. The discrepancies in this case, from these witnesses, only enhance the fact that the basic facts of this case are true; that on the night of January 6th, Frank Pizzi and Bobby Russo made a loan of two hundred dollars to Robert Roy Russo. And for the next three weeks, they threatened him. He was struck on several occasions. His life was threatened. It's all there. Everybody testifies to that.

Mr. Alongi makes great play out of the fact that (665) when the man was hit in the bar and outside the State Diner, he never called the police. He's in a bar. The man is standing over him with a gun in his belt. Do you expect him to say, "Time out, I want to call the police?" What's he going to do? He lived in fear. He lived in fear of these two men. And like any man in trouble, any man in trouble, you always have the hope, the easy way out. Something's going to happen. I can get out of this. I don't have to go to all of this trouble. I don't have to go to the authorities.

As we will find out, when I review the evidence, the straw that broke the camel's back was Sunday, the 25th. Now, let's go over the evidence. January 6, he went to the White Eagle Bar. Frank Pizzi came up to him and said, "I hear you need two hundred dollars." He goes over to Bobby Russo, his partner. Bobby Russo says, "It's okay." And he said, "Give him a shot." Robert Roy Russo's story. Nobody else. Who was there is here to testify? John Renyun never appeared.

But what did Robert Roy Russo say occurred that night. How can we corroborate his story from the evidence? Well, he said, "Bobby Russo said get his home telephone number, get his work telephone number." What did he do? He wrote it down. In a little brown (666) telephone book. That's what he testified to. And what do we find on Frank Pizzi when he's arrested? A little brown telephone book. "Bobby Russo, S" for stupid. "Hoffman La Roche" with the work telephone number of Robert Roy Russo. "Bob, home, S" with his home telephone number. And in between there is sandwiched, "Good Bobby," sitting right there. "Good Bobby." One must be a bad Bobby then, I guess.

We then go to the traffic tickets the following night. A hundred dollars. A hundred thirty-six dollars. It's insignificant. He said his best recollection was a hundred dollars. Thirty-six dollars is not going to make or break this case.

He goes to court and Frank Pizzi is sitting there talking downstairs with some Bloomfield policemen. He walks in and he sees Frank Pizzi. "What are you doing here?" "I'm keeping tabs on you. Don't get lost." How Frank Pizzi came to be at that police station, I do not know. He said, "I'm keeping tabs on you. Don't get lost."

So now let's go to Frank Pizzi's testimony. Now, what does Frank Pizzi say? "He came to me the night before. He said he needed money. I said, 'Come back the following night.'" He came back the following night. "We went to court. He was broke. He didn't (667) have any money. I had to pay it. I thought it would be thirty, forty dollars. I got the tickets. It was a hundred thirty-six dollars." For that man that he knew for four days, he takes his boss' money and lays out a hundred and thirty-

six dollars. This man who makes eighty dollars a week, because he didn't want to see this man get hurt. "So what happens after that, Mr. Pizzi?" They went out. "Let's go out and have a drink." "We both go out and buy drinks. We go to a couple of bars. After the bars, we go get ourselves a couple of girls and we go to the Town House Motel." "Who paid for the Town House Motel, Mr. Pizzi?" "I don't know." I asked him on cross-examination: "Do you remember being asked at the prior trial?" And he said, "I'm sure that Bobby Russo, Robert Roy Russo went inside and got the rooms."

Motel rooms don't come free, ladies and gentlemen, nor do prostitutes. A man with no money in his pocket, according to Frank Pizzi's testimony. The totality of which is incredible, the man with no money in his pocket, now later on in the night, according to Frank Pizzi, has money to buy a girl, to pay for two motel rooms, and to buy some drinks. "What time did you get home that night?" "It was light out. We went for breakfast, two or three in the morning." A man (668) who is working from seven o'clock in the morning until ten o'clock at night, where a total stranger hired a man to run the gas station while he took the night off to go to court, and then go out on the town. That's incredible, ladies and gentlemen. Absolutely one hundred percent incredible.

Thursday what happens? Well, Carol Russo was home. She gets a call from Mike. Why Mike? Why the name Mike? Except that Mike was there on Tuesday night when the loan was made. And then at midnight she gets a call from Bobby Russo. Frank later on says, "My partner called you." What does Bobby Russo say on the phone? "Where is your husband?" "He's not home." "Well, he better not be home because I'm going to come up and look for him." Midnight call. Read into it what you will.

What does Carol Russo say later on, on Friday? She gets a call from Frank Pizzi. Frank says, "We did your husband a favor. We did your husband a favor. And if you don't watch out, if he's not careful, you are not going to have a husband around to worry about any more." Any more.

The whole fault with Mr. Alongi's theory is that he doesn't allude to telephone calls that were received by Carol Russo. If she was in on the scheme, (669) this whole con job, how does he account for the telephone calls that she received? Can't. Because it was no con job. It was the truth.

Robert Roy Russo goes to the White Eagle that night, gets there a little bit late. He received a telephone call earlier in the day, his loan is now two hundred and seventy dollars. And he goes to the White Eagle with forty dollars, I believe, which he had gotten from his father. And he gets hit by Frank Pizzi. One punch. I believe he testified it was an open hand slap. I don't know what kind of a mark an open hand slap would leave. I've never been knocked down by an open hand slap, and I hope I never am.

As he's getting off the floor, Frank unbuttons his jacket, pulls it back, and there in his belt—and this is important. What does he see? A pearl handled chrome revolver. It comes in later on, that same gun, when Frank, to show off his shooting at the buses. Why is that gun so important? Why is the description of that gun so important? Linda Palmisano. That's why. Linda testified that Frank always carried a gun. Eight out of the ten times she saw him, always had a gun. "What type of a gun was it?" She wasn't in court when Robert Roy Russo testified. She never read his testimony, either at the Grand Jury or at the (670) prior trial. "What type of a gun does Frank Pizzi have?" "He has a white handled chrome revolver."

Things are coming together now. At this point Robert Roy Russo is scared and he has every right to be. Every right.

Let's go on to Sunday. What happened on Sunday? Frank shows up. Carol does not know he's coming for dinner. And he's there. This man who makes eighty dollars a week, walks in, out of magnanimity of his heart, he gives their little girl, not one dollar, five. Five. This man who never had any money. Five dollars. He testifies it was a very simple conversation that lasted over a couple of hours. Nice dinner. Never wanted to be there in the first place. What does he testify that Carol Russo tells him? He says, "Well, he needs a job." Which means he got to handle money. Oh, yes, if he needs the job, he needs the money. "What type of a man is your husband?" She wants him to get the job. The stranger, who is an absolute stranger. She's known him for an hour. She now tells him, according to his own testimony, "My husband's a liar." And on top of that, "I'm going to leave him." Incredible. You just don't do things like that. You saw her. You saw her demeanor. You saw the way she testified. Do you think she'd tell a total (671) stranger about her own personal problems? No.

What do Robert Roy Russo and Carol Russo testify had happened that Sunday? He came in. He said in short, "Me and my partner are taking over the Pink Pussy Cat Lounge." Me and my partner. "Who's your partner?" "Bobby Russo. We are taking over the Pink Pussy Cat Lounge and you can help yourself out, Mr. Russo, Robert Roy Russo. We'll give you a job there. You'll work at night, two nights a week. The rest of the stuff you can handle at home on the telephone." "It sounds illegal." "It is illegal. Don't worry about it. I got friends in the police department." That's all important.

Now, it all ties in as the facts develop. What's so important about him taking over the Pink Pussy Cat Lounge? He was asked on cross-examination by myself at the end. I said, "Isn't it a fact that you attempted to buy the Pink Pussy Cat Lounge?" And he categorically denied it. I said, "Isn't it a fact that you got yourself a lawyer?" And he categorically denied that.

Don't even need Nancy Rivera, ladies and gentlemen. The document puts the lie to Frank Pizzi. The letter from Paul Alongi, dated February 18, to Mr. Morris Novick. "Re: Pizzi—Pink Pussy Cat Lounge. (672) Dear Sir: Enclosed find contract supplied to me for above. They are not completed as I have not heard from my client." Why couldn't he own up to that on cross-examination? Because it would have confirmed the conversation on Sunday. It would have meant, yes, he and his partner, Bobby Russo, were going to take over. They were going to buy into the Pink Pussy Cat Lounge. And what were they going to do there? What was the whole mystique about the telephone calls, how Robert Roy Russo, for two nights a week work could make two hundred dollars a week. Well, what was going on at Pat Malanga's gas station that everybody was hanging out there? A simple two-bit gas station. And everybody's there.

Think back to January 24 when the four men were in the bar. The last time Robert Roy Russo was hit. And one of them says, "How about handling NBHS, numbers, book, horses and shylocking?" Is that it? Is that what was going to go on?

The following week. Two calls a night to Carol Russo from Frank and Bobby. "Where is your husband? We want to meet him." Sometimes her husband was home. Sometimes he wasn't. She testified he was too afraid to

answer the telephone. Too afraid. Ladies and gentlemen, if he wasn't home when some of those calls (673) were received, he didn't need them to get him out of the house. He could get out of the house on his own. Why do they have to call up for? Just to do him a favor? Bobby Russo, Robert Roy Russo, stupid, and they were going to do him a favor. Two times a night. Makes no sense. It's incredible.

And then we come to the State Diner. He's scared. He's running scared now. He goes. Goes late. His wife testifies that he's told her time and again that he's scared. He didn't have to say Frank Pizzi and Bobby Russo. She already knew the names. She knew the names, and Frank Pizzi had dinner on Sunday. She had spoken to Bobby Russo on the telephone. Every time you talk to your wife, do you mention the names of someone who you know that she knows who you are taking about? They. They. That's all he has to say.

He goes to the State Diner and he's hit, and Bobby Russo threatens his life. Frank Pizzi says, "My partner wanted to take a baseball bat to you." It's your recollection that controls. My recollection is that when he came home that night, according to Carol Russo, he told her about it. My recollection is that that's what she testified to, that it's your (674) recollection that controls.

What happened after that? He goes to work on Saturday. At the gas station. Frank Pizzi is there. How is he dressed? Dressed in sports jacket and shirt. And he's twirling his gun, that pearl handled chrome revolver. That's a big thing in his life. Got no money. Worked there all day long. Supposed to go to the Pink Pussy Cat. Goes to the Pink Pussy Cat the following week on Wednesday, but, wait a minute. The Monday in there is January 19. That's the day of the birthday party. What does

Frank Pizzi say? Gets on the stand. And he says, this place that he'd only been in two or three times in his life, "I went there for the birthday party. Robert Roy Russo came and he picked up Bobby Russo." What does Nancy Rivera say? What axe does she have to grind? None. "He bought the birthday cake." A simple thing like bringing a birthday cake. He denied it. Not bringing anything. Why does he have to deny it? Why? Why does he have to deny on the stand any relationship with the Pink Pussy Cat Lounge at that point? Very simple. First own up to it, and she said that he was in there more times, and he had more of an interest in it than he wants you to believe. Because he put the credibility into the conversations of that Sunday (675) dinner.

So what happens after? I believe it was Wednesday of that week. Bobby Russo's supposed to meet him, according to the testimony of Robert Roy Russo. He's supposed to meet him. At the Pink Pussy Cat Lounge to be an alibi for him. Frank has to go some place. He gets there. He's late. Goes into the back of the bar where Frank hits him again, once, and only once. I don't know whether it was a punch or an open hand slap at this point, but it was only one punch. I don't even know whether it would leave a mark.

What happened earlier that night? Linda. She's in the bar. She knows Frank. She's dating him. And Frank's angry. Robert Roy Russo isn't there. He's got his gun with him. She's tending bar. Robert Roy comes in. She goes to the back of the bar. She hears yelling. She starts to walk back. What happens? She sees him hit him.

There are too many people in this case, ladies and gentlemen, who are filling the holes in the principal issue.

Was the loan made? Did he use criminal means to collect?

Palmisano was not here when Robert Russo testified. She never read his testimony. And yet she (676) testifies to the same thing. How can she do it? It's not true. It's impossible.

Later on Robert Roy Russo has to go to her house. Her apartment. Goes there and pays thirty dollars and leaves. And he's told, "Come back tomorrow night, Saturday night." Frank tells him, "Meet me in the bar," and he goes to the bar and he gets hit again. And again the four men are there. "Hey, you know, Frank was in the same boat as you are. He was up against it. We gave him a chance. We gave him a chance to work it off. And he did. You handled that real well, Frank. You handle NBHS at Hoffman La Roche." I didn't even know that he could have guinea pigs. They don't bet. He didn't do it. And all this time why isn't he going to the police?

Well, we come to Sunday, the 25th, the straw that broke the camel's back. What happened Sunday, the 25th? Linda's home. She makes the telephone calls for Frank, and she hears Frank talk to Robert Roy Russo and threaten his wife and child and himself. Before this she's had conversations with Frank and Bobby Russo. "What did they do for a living?" "They, both of them, told me they lent money out." Both of them. Never heard any prior testimony. Never in court when they testified. Threatened his wife and (677) child.

Well, now, let's go to Bobby Russo, the defendant in this case. Bobby Russo says he remembers being in Linda's apartment on Sunday afternoon late in January. And I asked him, "Who else was there?" "Frank, Linda, and another girl." And what happened? I asked him.

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"Did Frank Pizzi make any telephone calls that day?" Bobby, if he wanted to be consistent, should stick to it. Should have said, "No." He got a little confused. He said, "Maybe. I don't recall." What does that mean? The day of these infamous telephone calls, they were made. What else did he say about Frank Pizzi? I asked him. I said, "Did you ever see Frank Pizzi with a gun?" He said, "Maybe. I don't recall." Ladies and gentlemen, you don't forget if you see a man with a gun. You just don't. If he didn't, he would have said no.

Go through the events of Sunday, what happened. Carol gets a telephone call from her husband. She previously got a telephone call for her husband at Linda's apartment. She called Linda's apartment and she talks to Frank. "What about the threats?" "Don't worry about the threats. We'll work it out. You pay me five or ten dollars a week. The loan is four hundred dollars. When it's all paid off, it's (678) forgotten. Forget it." But it doesn't rest there. Where do they go? They've had it. Both of them have had it. Carol's had it with the telephone calls. Robert Roy realizes there's no place he can go any more. These guys are going to be all over his back 'til time immemorial unless he puts an end to it now. Where can he go? Where can he go to get help? It's a fabricated story. And Frank Pizzi never mentioned to him about his contacts at the Bloomfield Police Department, where can he go? He'd go to the Bloomfield Police Department. It's the local police. If you want to fabricate a story, fabricate a story and let it die there, right? But what did Robert Roy Russo do to protect himself? To bring back credibility to this case. I'm not going to put my hands, my life and my wife and my child's life in the hands of the Bloomfield Police Department. He might just have those contacts. He calls the FBI. There is the protection. Bloomfield isn't going to do anything

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that the Bureau's in on, or any other law enforcement is in on. Because two agencies will have the case.

So when he went to the Bureau, that's what brought it into this court and in the local court. He ruined the research project he was working on because of threats. On Sunday night he gets a police escort home. Monday (679) he goes to the police department. He's scared. You'd be scared. I'd be scared. So what does he tell the police department? He blurts out a story. As best as he can recall under the circumstances when he's scared. He blurts out a story. Here it is. You'll have it to read. It runs all of three and a half pages. Ladies and gentlemen, it will take you five and a half minutes to read that document. He was on the stand for how many hours? And they say this isn't complete. It's not complete. Certainly it's not complete. It wasn't intended to be a complete document. Not at all.

He went to the Grand Jury. You've got it here. Right here. It runs approximately twenty-nine—forty pages. Question and answer. You'll see at the top. It says, "Examination by Mr. Richardson." That was me. He answered the questions that I put to him. He didn't answer any other questions. Is that a complete document? No, it's not intended to be a complete document. Not at all. The complete document is his testimony on the stand. To you. Because you are the ultimate. You are the people who tell guilty or innocent. There's where the complete story has to come out. That's the skelton. It's all it is intended to be. That's all it is.

But the case doesn't die. Doesn't die on Sunday, (680) the 25th. Because on Tuesday, Carol get another telephone call. From Frank. "Won't be around. Send the money to Pat's gas station." Again, Pat's gas station. What's going on at Pat's gas station? She sent it. Here

it is. Here it is. Signature on the back, "Frank Pizzi." Made no attempt to prove, ladies and gentlemen, that this is Frank Pizzi's signature, and, indeed, from those receipts, the signatures do not match. I'll concede to that. He said, "Send it to Pat's gas station," and that's where it was sent. What was going on at Pat's gas station? I don't know. I wasn't there. There were a lot of strange people there. Frank is one of them. Maybe somebody else signed this. I don't know. But it was sent there and it was sent there at Frank Pizzi's instructions. Otherwise, why would she send it to Pat's gas station?

Linda Palmisano. The barmaid. Not married. Two children. Working until three o'clock in the morning. And she was dating Frank Pizzi. He testified he stayed over her house once. Once. She testified he was there almost every day. She never saw him in work clothes. He was alway dressed in sports clothes, sport shirt or sport jacket. We've got an inconsistency here between her testimony and Frank Pizzi's. Because he says, "I was only there once." But he also says, "Hey, (681) we had this thing going." "What do you mean by 'this thing?' " "We just had this thing going." This guy, Frank Pizzi, who loves to go out on the town and find a girl every night, and he's got a thing going. Did he only stay over there once? No. Or is Linda telling the truth? He was over there quite a lot. And he never left for work at seven o'clock in the morning. Because he didn't go to work at seven o'clock in the morning. Never came home at ten o'clock at night because he didn't work until ten o'clock at night. He never wore work clothes because he didn't have to wear work clothes. Every day without fail and half day on Sunday, according to his testimony, he worked at Pat Malanga's gas station. Except, of course, January 27th, when he went out and signed for thirteen hundred dollars worth of furniture. Put his name on two contracts

for this girl that he really didn't like, only stayed over once. But they had this thing going.

Ladies and gentlemen, this story is incredible. It's incredible. It's unbelievable. Does he have an interest in this case not to tell the truth? You decide it.

Bobby Russo, Robert Rocco Russo. The quiet man on the team. Frank does the heavy work. Frank does the hitting. Frank does all the talking. Robert Rocco (682) Russo says very little except when he told Linda Palmisano, "We're together." Except that he called, looking for Bobby Russo, Robert Roy Russo, stupid, almost every night. Why? Why would he call?

Frank. What does Frank Pizzi say about this telephone number for work? How did it get there? This story is, her husband is looking for her—Robert Roy Russo's wife is looking for her husband in the middle of the day, and she called Pat Malanga's gas station. And she tells Frank Pizzi, "We're behind in a bank payment. His father just had a heart attack. Call my husband for me at work. Here's the number." He calls it once, according to his testimony. Once. But here's the telephone number, right here. The telephone numbers were on Frank Pizzi.

When Carol Russo spoke to Bobby Russo, certainly she hands him the telephone number. Frank had the telephone numbers. And isn't it logical, when you are talking and telling someone on that Sunday where your husband is, don't you give out the telephone number? Fear. Fear does strange things to people. It did strange things to Robert Roy Russo and Carol Ann Russo.

Mr. Schwartz says that there was no conspiracy. There's no proof to show an agreement. Ladies and gentlemen, there is no direct proof, no. I don't have (683) a written contract between Frank Pizzi and Bobby Russo that says

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we are now going into a loan sharking business. This is how we will divide the profits. They don't enter into a contract. You don't have it when you go into a criminal conspiracy.

Circumstances. The circumstances show it. The calls to the house. Frank Pizzi's statements about "my partner, Bobby Russo." Constantly come throughout this case, "my partner, Bobby Russo." Where was Frank Pizzi when he was arrested? Intersection in Belleville or Bloomfield. I forget which. Driving Bobby Russo's car. What does Bobby Russo say he was doing at nine o'clock at night driving his car? I asked him. He said, "He was taking it to get it washed." Nine o'clock at night? Nine o'clock at night, getting a car washed. They were partners. They worked in a team. Circumstances are all there. There is no doubt. No doubt.

The indictment charges a conspiracy as a formal legal word. It's an agreement. They worked together. They acted together. They were at the State Diner together. They were at the Pink Pussy Cat together. At the Pink Pussy Cat. "When did you go to the Pink Pussy Cat for the first time, Mr. Pizzi and Mr. Russo?" "Robert Roy Russo took me there. The night of the (684) White Eagle, we left there and went there to see this good looking barmaid." That's funny, because if that's early in January, Frank Pizzi brings the cake for the owner, the owner's daughter for the birthday party. He's got the contract to buy the place. And he is challenged by Nancy Rivera, no axe to grind, and Linda Palmisano, no axe to grind. They were there in December. The exact date, who knows. But they were there first. And the important thing about it is that they were going to buy the Pink Pussy Cat and turn it into what they were going to use it for. NBHS. Those are important letters. To tie

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in with Pat Malanga's gas station, to tie in what they wanted to do with the Pink Pussy Cat. To tie in with what they wanted Robert Roy Russo to do. Two hundred dollars. Insignificant. They had a fish. Or they thought they had a fish. And they wanted to use him, get him in a bind, scare him, get somebody to work for them. That's what it was. That's the end of it. In a nutshell. There wasn't more. You can dwell on it all. All the exhibits are before you. You now have an awesome task, going in and deciding the guilt or innocence of two men. On the facts and the law, as the Court will give it to you. If you find from the facts that these two men are innocent, that the (685) Government didn't prove beyond a reasonable doubt our heavy burden, and it's a heavy burden, if we didn't prove it, tell us. Not guilty. Don't be afraid.

Ladies and gentlemen, from these facts, if you find these defendants are guilty, no sympathy, no prejudice, no cynicism and no fear. Do your duty. Come back and say guilty. That's your job. That's your sworn oath. Don't be afraid to do it. You are going to tell one of us, one side or the other who is lying. Find out who's lying in your own minds and tell us, and let the chips fall where they may.

Thank you very much.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1099

ROBERT ROCCO RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue presented here is whether the prosecutor improperly commented on the evidence during his summation.

After a jury trial with Frank Pizzi in the United States District Court for the District of New Jersey, petitioner and Pizzi were convicted of having used extortionate means to collect an extension of credit and of having conspired to do so in violation of 18 U.S.C. 894. Petitioner and Pizzi each received three year sentences. The court of appeals affirmed (Pet. App. A).

1. On January 5, 1970, one Robert Roy Russo (no relation to petitioner) had a conversation with one John Renyun in a Nutley, New Jersey, bar (Tr. 27). Russo stated that he had financial problems. When Renyun

offered to help, Russo said he needed $200. Renyun instructed Russo to meet him the next night at a bar in Bloomfield, New Jersey (Tr. 64-65).

The following night, January 6, 1970, Russo met Renyun at the bar, where Renyun introduced him to petitioner and co-defendant Pizzi (Tr. 27). Pizzi told Russo, "I heard you need two hundred dollars." Russo replied affirmatively. After telling Russo that he could get the money, Pizzi turned to petitioner and asked, "Should we give him a shot?". Petitioner said "yes" and handed $200 to Pizzi, who in turn gave it to Russo. At petitioner's direction, Pizzi wrote down Russo's home and business telephone numbers (Tr. 29-31, 70, 73).

On January 9, three days after the loan, Pizzi telephoned Russo at work and demanded money. When Russo explained that he had none, Pizzi said that the debt was now $270—the $70 being "interest." Pizzi ordered Russo to bring the money to a bar at 6 p.m. that evening (Tr. 34). Russo borrowed $40 from his father and arrived at the bar about 6:30 p.m. He handed the money to Pizzi, who promptly knocked him to the floor and said, "[t]hat's for being late." Pizzi told Russo: "Now, you think you only owe me two hundred thirty, but you owe me two fifty. You owe me an extra twenty for being late." Pizzi pushed back his coat and revealed a chrome revolver in his waist band. He warned Russo to "[w]atch how you come off the floor" (Tr. 35). Petitioner stood laughing beside Pizzi. Pizzi told Russo that he had to do what he did for petitioner, his partner (Tr. 35-36).

On January 11, a Sunday, Pizzi came uninvited to the Russo home (Tr. 38). He declared that he and petitioner were going to give Russo a "break" which would help him to pay off the debt. Pizzi explained that he and petitioner were taking over the Pink Pussycat, a Passaic,

New Jersey, cocktail lounge. Pizzi said that Russo could earn several hundred dollars by working two nights a week at the lounge and doing work at home using the telephone. Mrs. Russo told Pizzi that the work sounded illegal. Pizzi said that it was, but that he and petitioner had "connections" (later explained to refer to local police) and never got caught. Pizzi told the Russos that he and petitioner were in the money-lending business and that he used a gun to take care of people who got "out of line" (Tr. 38-39, 223-224).

After further meetings, at which threats were made and petitioner was physically abused (Tr. 43, 231), Pizzi telephoned Russo and again demanded money. Russo stated that he did not know where he could get any. When Pizzi mentioned that he managed a gas station in Belleville, New Jersey, Russo suggested that he could work there to pay off the debt. Pizzi agreed and told Russo to come to the station on Saturday, January 17, 1970. When Russo went to the service station on the 17th Pizzi and some other men were there. Pizzi, who was dressed in a sports jacket and slacks, spent the day answering the telephone. Cars kept entering and leaving the station, but no one bought any gas (Tr. 44).

On January 24, at Pizzi's instruction (Tr. 50), Russo went to the Pink Pussycat. Once again he had no money. Pizzi punched Russo, saying that he did it for his partner. While Russo was lying on the floor, an unidentified man came up to Pizzi and said: "You handled that fellow nice, Frank. You did a real nice job on him. I groomed you really good." Then, addressing Russo, the man said: "Frank was in the same jam you are in, and I gave him a shot and he squared himself away with me. Now, you got the same kind of a deal coming to you." Russo was told that he would be allowed to handle "NBHS"—which

the unidentified man said meant numbers, bookmaking, horses, and shylocking—at the plant where Russo worked. Russo told the man he was not interested. Before Russo left, Pizzi told him that the two week old $200 debt had increased to $300 (Tr. 50-51).

The next day, January 25, petitioner telephoned Russo at work and demanded that Russo pay him $400 that evening. Shortly thereafter Pizzi called Russo and threatened to kill him, his wife, and his daughter. Later that day, Russo went to the F.B.I. (Tr. 52-53).

2. Petitioner claims that the summation of the United States Attorney was not based on "the evidence and the legitimate inferences flowing therefrom", but unfairly depicted "the defendant Pizzi (and by association the Petitioner) as sinister criminal elements, undoubtedly part of the organized criminal ring" (Pet. 16-17). The court of appeals, after a "thorough evaluation of the record" concluded that the comments of the prosecutor were "within the bounds of reasonable inference from that evidence" (Pet. App. 4a). The finding is clearly sustained by the evidence detailed above. The comments of the Assistant United States Attorney, cited by petitioner (Pet. 6-8), pertain to the version of the events narrated by the chief witness (the victim of the illicit conspiracy), and deal principally with the possible motive petitioner and Pizzi had to commit the offense: use of the extortionate loan to enlist petitioner as an employee in other illicit activities in which they were engaged at the Pussycat Lounge and at the gasoline station.[1] Petitioner does not claim that this evidence

[1]Petitioner also cites as improper the remark of the prosecutor to the jury that "from these facts, if you find these defendants are guilty * * * [c]ome back and say guilty. That's your job. That's your sworn oath" (Pet. 8). Even when taken out of context, it is difficult to see what was improper about this statement. When viewed in context it is plain that the comment was clearly appropriate, since in the preceding sentence the Assistant United States Attorney told the jury (Pet. App. 24a): "If you find from the facts that these two men are innocent, that the Government didn't prove beyond a reasonable doubt our heavy burden, and its a heavy burden, if we didn't prove it, tell us. Not guilty. Don't be afraid."

was improperly admitted, and it clearly was proper for the prosecutor to argue to the jury from that evidence—in contrast to defense counsel who, the court of appeals found, argued points which were "totally unfounded on the record" (Pet. 5a, n.).

Moreover, no objection was taken to the allegedly improper remarks made by the prosecutor in his summation. Under these circumstances, as Chief Judge Friendly recently wrote in *United States* v. *Briggs*, 457 F. 2d 908, 912 (C.A. 2):

> [A]n appellate court will reverse only if the summation was so "extremely inflammatory and prejudicial," *United States* v. *DeAlesandro*, 361 F. 2d 694, 697 (2 Cir.), cert. denied, 385 U.S. 842, 87 S.Ct. 94, 17 L.Ed.2d 74 (1966), that allowing the verdict to stand would "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). See also *New York Central R.R.* v. *Johnson*, 279 U.S. 310, 318-319, 49 S.Ct. 300, 73 L.Ed. 706 (1929); *San Antonio* v. *Timko*, 368 F. 2d 983, 986 (2 Cir. 1966).

See, also, *United States* v. *Benter*, 457 F. 2d 1174 (C.A. 2), certiorari denied, 409 U.S. 842.

The summation here, as the court of appeals properly found (Pet. App. 5a), hardly falls within the limited exception to the rule requiring an objection contemporaneously with or immediately after the summation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.